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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JANUS INDUSTRIES, DOING BUSINESS AS ACAPULCO SMOKE SHOP, AND JAMES B. JANUS,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress can extend its Commerce Clause to prohibit intrastate sale of drug paraphernalia, without providing a statutory nexus to interstate commerce or finding that the proscribed activity affected commerce.

2. Whether the Grand Jury's indictment of the defendants failed to state an essential element of the alleged crime, i.e. the nexus with interstate commerce.

3. Whether the search and seizure of evidence in this case violated the Fourth Amendment of the Constitution because of the lack of particularity inherent in the statutory definition of drug paraphernalia.

LIST OF PARTIES

The parties to the proceeding are:

Petitioners:

JANUS INDUSTRIES, doing business as
Acapulco Smoke Shop, and JAMES B. JANUS.

Respondent:

UNITED STATES.

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COMES NOW the Petitioners James B. Janus and Janus Industries, doing business as Acapulco Smoke Shop, and respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, infra) was issued on January 18, 1995 is unreported. The judgment of the district court (App. B, infra) is unreported.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). The Court of Appeals for the Tenth Circuit entered its judgment on January 18, 1995, (App. B, infra). On February 27, 1995, the Tenth Circuit, without comment, denied the petition for rehearing and suggestion of rehearing en banc (App. A, infra). A copy of that order is attached.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3 provides "The Congress shall have Power...to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The Fourth Amendment provides "... no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. The provisions of 21 U.S.C. sections 857 and 863, 21 U.S.C. section 1956(a)(1)(A)(i) are set out in Appendix A.

STATEMENT OF THE CASE

This case raises the issue of the unconstitutional assertion of jurisdiction over intra state actions alleged to have violated 21 U.S.C. sections 857 and 863. It further raises the question of an elver search warrant.

The prosecution of the Defendant was a result of Operation Pipe, an investigation by the U.S. Customs Service into suspected drug paraphernalia dealerships throughout the United States.

On January 29, 1991, Agent Jeff Santelli (an employee of the United States Air Force Office of Special Investigations) went to the Acapulco Smoke Shop, at 3520 Brighton Boulevard in Denver, as a potential customer, to see whether or not there was any drug paraphernalia on the premises. Mr. Santelli claimed he saw "drug paraphernalia" there, and this bold assertion became the basis for a search warrant. The agents arrived to "secure" the premises about 5:30 or 6:00 p.m., but Agent Kline did not arrive with the search warrant until about 9:00 or 9:15. Other than a reference to the definition of drug paraphernalia contained in the statute, there was no description in the search warrant of what items were to be seized.

Without any way to distinguish between alleged contraband and lawful products, a great many lawful items were also seized. These included tobacco pipes, "safe can," 10,000 plastic bags, and many boxes of glass of his stock.

A civil forfeiture action, Case Number 91 B 2055 in the United States District Court, District of Colorado was commenced by the Government in November, 1991. That case sought to declare the warehouse at 3520 Brighton Boulevard a

nuisance, and sought to forfeit Mr. Janus' warehouse, bank accounts and residence in Lakewood, Colorado to the Government. After nearly two years of ongoing civil litigation, the Government sought dismissal of that forfeiture proceeding in order to proceed the criminal action against the Petitioners. The defendant objected, and contended that the "civil" case was so punitive as to constitute a double jeopardy bar to the second "criminal" case. However, over the defendant's objection, the "civil" case was retired from the active docket by the trial court on September 3, 1993.

James B. Janus and James B. Janus Industries, Petitioners, were indicted by a federal grand jury on July 20, 1993. The indictment, attached as Appendix D, infra, alleged that the defendants sold drug paraphernalia. The defense sought suppression of evidence on the basis that the search warrants and affidavits were invalid, and that the resulting discovery of the seven small marijuana plants was tainted because it was discovered pursuant to an invalid search warrant and general exploratory search.

In a memorandum on jury instructions during the trial, defense counsel pointed out that the indictment referred to conduct which occurred under three different versions of the federal drug paraphernalia statute. Because Count 1 of the indictment alleged conduct "from on or about August 1, 1988 through November 29, 1990," the applicable statutes were both 21 U.S.C. 857 and 21 U.S.C. 863. Due to the complications that this would cause in drafting a proper jury instruction, the Court dismissed Count 1, and the case went to the jury on Counts 2 and 3 (drug paraphernalia counts) and Count 161 (cultivation of marijuana).

REASONS FOR GRANTING THE PETITION

The Drug Paraphernalia Act (the Act), originally 21 U.S.C. section 857, 21 U.S.C. section 863 as re-enacted on or

about January, 1990, purports to extend federal law to reach intrastate conduct. This intrudes into criminal law, an area traditionally regulated by the states. This law is not a proper exercise of its federal authority since Congress failed to make the findings necessary to properly exercise its commerce power. An interstate commerce nexus must still be required as an essential element of the crime of sale of drug paraphernalia under 21 U.S.C. section 863. The federal government is not empowered with plenary police power. Congress must find that an activity affects commerce before regulating it as a necessary prerequisite to its assertion of authority under the commerce clause. Petitioner's conviction must be overturned because the government failed to prove that the conduct of Petitioner had any connection to or substantially affected interstate commerce. Moreover, the conviction must be reversed because the grand jury indictment was fatally flawed by its failure to properly identify which version of the statute Petitioner was to be tried under, and it failed to allege the crucial element of interstate commerce. Finally, Petitioner's conviction must be reversed because the search and the resulting evidence was obtained pursuant to an elver search warrant and unconstitutional general search.

I. Drug Paraphernalia Act Lacks Requisite Interstate Nexus

Petitioner was convicted under 21 U.S.C. section 863 which makes it unlawful to sell or offer to sell drug paraphernalia. Congress "can exercise only the powers granted to it" by the Constitution. Celiac v. Maryland, 17 U.S. (1 Wheat.) 316, 405 (1819). "[U]nlike the reserved police powers of the States, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce

Clause." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S 264, 311 (1981). To properly invoke its commerce power, Congress must either regulate interstate commerce directly or find that the activity to be regulated substantially affects interstate commerce.

In the earlier version of the drug paraphernalia statute, there was a jurisdictional interstate commerce nexus, which is explicitly stated in 21 U.S.C. section 857. In section 863 of the law as re-enacted in 1990, however, no jurisdictional interstate commerce nexus was stated. Moreover, in enacting this Legislation, Congress did not make any findings that the sale of drug paraphernalia is a class of activities "affecting commerce", or which had a cumulative effect on interstate commerce. This is a crucial defect. For example, in Title II of the Consumer Credit Protection Act, 18 U.S.C. ss 891 et seq., Congress made explicit findings that extortionate credit transactions affect interstate commerce. Section 201(a) of Title II May 29, 1968, states in pertinent part: "Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce" 18 U.S.C. s 891.

Petitioner submits that, with reference to the federal drug paraphernalia statute, Congress failed to make the necessary findings which demonstrate a substantial effect on interstate commerce. Specifically, Congress in re-enacting the Act failed to link the activity proscribed by the Act to commerce, either by including an express commerce nexus or making the necessary supporting findings concerning the impact of intrastate sale of goods on the nation's commerce. As noted by this Court in the Posters 'N' Things, Ltd., _____ U.S._____,114 S.Ct. 2271 (1994), the only Congressional history that exists for any of the law's three versions is the House subcommittee hearing which is memorialized in Hearing on H.R. 1625 before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 99th Congress, second session, May 8, 1986. That Congressional report does not contain any findings with

regard to the impact of the activities on commerce, nor does it allude to any other hearings. The attenuated relation, if any, to interstate commerce, and broad sweep of the statute, is a constitutionally impermissible attempt to establish a federal police power and Petitioner Janus' conviction under it cannot stand.

The federal government may act only pursuant to a power granted to it by the United States Constitution. Among those powers granted is the power to regulate interstate commerce. Broad as the commerce power is, its scope is not unlimited, particularly where intrastate actions are concerned. The power to regulate commerce may be plenary, but the reach of that power is circumscribed by the Constitution and is not a comprehensive grant of federal power. It does not convert the Constitution from a system of government with enumerated federal powers into one in which the only subject matter limitations placed on Congress are those which it chooses to impose upon itself. There was, and still is, a definitional difference between a federal government and a national government.

That portion of 21 U.S.C. section 863 under which Petitioner was convicted is invalid because Congress has failed to link the regulated activity to interstate commerce, either by including an express commerce nexus or making the necessary supporting findings. For example, the Act is silent about the effect of the sale of a zip loc plastic bag (which defendant was criminally charged with selling) on interstate commerce. Also the Act fails to indicate the extent to which Congress desired to exercise its Commerce Clause power. The Supreme Court has never held such findings to be implicit in the enactment of legislation; rather it has consistently looked to legislative history or legislative debate to establish Congressional rationale. Stirone v. United States, 361 U.S. 212, 216-18, 80 S.Ct. 270, 274, 4 L.Ed. 2d 240 (1962).

The recent opinion of this Court int United States v. Lopez, 1995 WL 238421 (U.S.), decided April 26, 1995, would appear to reinforce the requirement that Congress must still articulate and require an interstate nexus. This Court stated "[t]he Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation." Id at 238121, *10. Here, Congress has failed to legislate within the scope of its authority. The Judicial branch does not have the authority under the Constitution to construct an Interstate Commerce bridge where none exists. And when legislation intrudes upon traditional state prerogatives, explicit findings are essential to demonstrate the legislation's validity. In the few cases in which the Supreme Court has excused the absence of Congressional findings, there have always been ample indicia of a commerce nexus upon which to rely, by means of statutory definitions, legislative history or previous regulation of the activity in question. The government in this case is attempting to "boot strap" the lawfulness of the drug paraphernalia statute, apparently by invoking a general "police power" that the federal government does not have.

The Tenth Circuit's decision of January 18, 1995 implicitly accepted this argument in its finding that courts have consistently upheld congressional regulation of the class of intrastate drug activities. The Court went on to find that "[t]herefore, because intrastate sales of drug paraphernalia are part of this properly regulated class, it follows that the drug paraphernalia statute is a proper exercise of Congressional power."

It is not implicit in the legislation that the federal drug paraphernalia statute is part of the larger regulated class of drugs. This is a determination that Congress must make, not the courts. As this Court stated in United States v. Bass, 404 U.S. 336, 344, 92 S.Ct. 515,521 (1971) a court's interpretation does "not substitutes for congressional lawmaking." The Bass Court

set aside the conviction for possession of a firearm because the government had failed "to show the requisite nexus with interstate commerce." Id 404 U.S. at 347, 92 S.Ct. at 522. In Scarborough v. United States, 431 U.S. 563 (1977), the Court characterized Congress's deliberate use of the term "affecting commerce" in the statute at issue as a "means to insure [its] constitutionality." Id at 575 & n.11. The decision of Congress to delete this language in 21 U.S.C. section 863 when it had been present in 21 U.S.C. section 857 reinforces what must be apparent: that the statute lacks an adequate nexus to interstate commerce. Congress's omission of any interstate commerce element from 863 cannot be considered a mere oversight. And even if it were, then this Court would still have to judicially dismiss Petitioner's conviction, just as in Bass, for the government did not prove an essential element of the crime.

The relationship between the commerce clause and the police power was tested during the emotionally charged Progressive Era in the case of Hammer v. Dagenhart, 247 U.S. 251 (1918). In Hammer, federal legislation forbade the shipment in interstate commerce of any goods manufactured in any plant that used prohibited child labor. This Court held the child labor statute in Hammer to be invalid because Congress had used its admitted powers over interstate commerce to eliminate a state's "internal affairs" completely. The issue of child labor laws had long been an emotional one, and there was a powerful consensus in the Progressive movement that these statutes were absolutely necessary to counteract the evils of an unrestrained laissez-faire economic system which tolerated, and indeed encouraged child labor. The Court was in the awkward position of having to defend jurisdictional limitations that worked against what it thought to be highly desirable social regulation.

Likewise, Petitioner in this case is well aware of the justified concern in this country about effects of drugs in the nation. The fact that the war on drugs is in the nation's best interests does not mean that the Commerce Clause has unlimited

scope. On the contrary, a clear and confined scope of the role of the executive branch is particularly appropriate to restrain the ever-increasing number of federal criminal statutes. As this Court recently held:

> [T]he Constitution protects us from our own best intentions. It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York v. United States, 112 S.Ct. 2108, 2131 (1992).

The increased federalization of traditional statelawcrimes by the Congress has a far-reaching impact on ourconceptual ideal of the balance between state and federal power. At a minimum, if Congress intended to depart fromits historical and traditional "substantial effect" requirement, then it should have clearly spelled out the basis for it reach of power to a local business.

II. The Indictment was Fatally Defective for Failing to State the Elements of the Alleged Crime as Charged

Petitioner was indicted under both the old version, section 857 of Title 21 and under the re-enacted version, section 863 of Title 21. The District Court refused Petitioner's request to clarify with specificity exactly under which law he was being prosecuted. The trial judge allowed the indictment to stand, but failed to clarify for the jury exactly which law was being applied and what evidence was "relevant to an essential element of the crime charged,". Had the trial judge required the government to

crime charged,". Had the trial judge required the government to identify with clarity and accurately the version of the law that was at issue, the elements would necessarily have been identified. The absence of any proof of that essential element of interstate commerce for the counts under which Petitioner was convicted by the government renders the grand jury's decision to indict fatally deficient.

It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. See United States v. Calandra, 414 U.S. 338, 343,94 S.Ct.613, 617, 38 L.Ed.2d 561 (1974). An indictment that merely tracks the language of the relevant statute is valid only if the statute "fully, directly, and expressly, without any uncertainty or ambiguity, sets forth ali the elements necessary to constitute the offense...." Russell v. United States, 369 U.S. 749, 765, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962) (quoting United States v. Carll, 105 U.S. 611, 612, 26 L.Ed 1135 (1881)). Where the statutory definition of an offense employs generic terms, it is not sufficient to charge the offense in the same terms employed by the statute; the indictment must "descend to particulars." Russell, 369 U.S. at 765, 82 S.Ct. at 1047 (quoting United States v. Cruikshank, 92 U.S. 542, 558, 23 L.Ed. 588 (1875)).

An indictment that fails to allege a commerce nexus, where such a nexus is a necessary element of the offense, is defective. See Stirone v. United States, 361 U.S. 212, 216-18, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960) (Hobbs Act); United States v. Hooker, 841 F.2d 1225, 1227-32 (4th Cir. 1988) (en banc) (RICO); United States v. Moore, 185 F.2d 92, 94 (5th Cir. 1950) (FLSA). This is true even though the language of section 922(q) contains no such requirement. See Russell v. United States, 369 749, 763-66, 82 S.Ct. 1038, 1047-48, 8 L.Ed.2d 240 (1962); 2 W.LaFave & J. Israel, Criminal Procedure s 19.2, at 452 (1984). Finally, because an indictment cannot be amended,

the failure to allege each element is fatal. Cf. United States v. Garrett, 984 F.2d 1402, 1415 (5th Cir. 1993); United States v. Mize, 756 F.2d 353, 355-56 (5ht Cir. 1985).

A. Jury instructions do not cure defective indictment

The Tenth Circuit has held that the fundamental problem of the defect in the indictment is not solved by the jury instruction because "[j]ury instructions may not include an element of an offense if that element was not charged in the indictment. (citations omitted). United State v. Peterman, 841 F.2d 1474, 1477, (10th Cir. 1988), cert. denied, 488 U.S. 1004, 109 S.Ct. 783, 102 L.Ed. 2d 774 (1989). This was a charge to the petit jury, while the mandate of "inclusion of all elements ... derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present," United States v. Hooker, 841 F.2d 1225, 1230 (4th Cir. 1988) (en banc) (emphasis added); see Stirone v. United States, 361 U.S. 212, 217, 80 S.Ct. 270, 273, 4 L.Ed. 2d 252 (1960) (holding variance "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury").

> Further, "and of paramount importance, a sufficient indictment is required to implement the Fifth Amendment guaranty and make clear the charges so as to limit a defendant's jeopardy to offenses charged by a group of his fellow citizens, and to avoid his conviction on facts not found, or perhaps not even presented to, the grand jury that indicted him." United States v. Radetsky, 535 F.2d 556, 562 (10th Cir.), cert denied, 429 U.S. 820, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976), overruled in part on other grounds by United States v. Daily, 921 F.2d 994, 1004 & n. 11 (10th Cir. 1990); see Russell v. United States, 369 U.S. 749, 770, 82 S.Ct. 1038, 1050, 8 L.Ed.2d 240 (1962).

Here the failure of the indictment to allege all the essential elements of an offense under s 856(a)(2) is a jurisdictional defect requiring dismissal, despite citation of the underlying statue in the indictment. See United States v. Crockett, 812 F.2d 626, 629 & n. 3 (10th Cir. 1987); United States v. Broncheau, 597 f.2d 1260, 1262 n.1 (9th Cir.), cert denied, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). "[T]he absence of prejudice to the defendant does not cure what is necessarily a substantive, jurisdictional defect in the indictment." United States v. Smith, 553 F.2d 1239, 1242 (10th Cir. 1977). In a recent case the Tenth Circuit took judicial notice of a critical omission of an essential element from the indictment -- sua sponte -- handed down by the grand jury and vacated a conviction. United States v. Brown, 995 F.2d 1493, 1504-1505 (10th Cir. 1993), certiorari denied 114 S.Ct. 353, 126 L.Ed.2d 317. The Brown court went on to state that: ." United States v. Smith, 553 F.2d 1239, 1242 (10th Cir. 1977).

"[j]ury instructions may not include an element of an offense if that element was not charged in the indictment." United States v. Peterman, 841 F.2d 1474, 1477 (10th Cir. 1988), cert. denied, 488 U.S. 1004, 109 S.Ct. 783, 102 L.Ed.2d 774 (1989). This was a charge to the petit jury, while the mandate of 'inclusion of all elements...derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present,' United States v. Hooker, 841 F.2d 1225, 1230 (4th Cir. 1988) (en banc)(emphasis added); see Stirone v. United States, 361 U.S. 212, 217, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960)(holding variance "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury").

An essential element of a crime - one that affects a substantial right - is "one whose specification ... is necessary to establish the very illegality of the behavior and thus the court's jurisdiction." United States v. Cina, 699 F.2d 853, 859 (7th Cir.

1983), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983). Although the missing element here does not describe overt illegal behavior, it is nonetheless essential in a federal indictment because it establishes the court's jurisdiction. See Stirone, 361 U.S. at 218, 80 S.Ct. at 273 (Hobbs Act indictment must charge effect on interstate commerce in order to show federal government's jurisdiction of crime); United States v. Moore, 185 F.2d 92, 94 (5th Cir. 1950) (indictment for violation of Fair Labor Standards Act does not state an offense if it does not show defendants were engaged in interstate commerce or otherwise within coverage of Act).

Established Supreme Court practice indicates that an issue is proper for certiorari if it was either presented or passed upon by the court below. United v. Williams, _____ U.S. _____, 112 S. Ct. 1735, 118 L.Ed. 2d 352 (1992). Certiorari may be permitted for "... review of an issue not pressed so long as it has been passed upon..."

Additionally, this Court has held the following:

> Respondents argue that this issue was not raised below. The appeals court, however, addressed the availability of a right of action to minority shareholder in respondents' circumstances and concluded that respondents were entitled to sue. It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law. Virginia Bankshares, Inc. v. Sandberg, 500 U.S. ___, ____, n. 8, 115 L.Ed. 2d 929, (1991) (citations omitted; internal quotation marks omitted).

III. THE SEARCH WAS UNCONSTITUTIONALLY OVERBROAD

A. Insufficient Identification of Items to be Seized and Qualification of Affiant

The definition of drug paraphernalia in the federal drug paraphernalia statute is so broad that a search warrant which refers only to the statutory language must necessarily be so elver as to violate the Fourth Amendment. The principle is clearly stated in Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927), that "[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is be taken, nothing is left to the discretion of the officer executing the warrant." Id at 196, 48 S.Ct. at 76. The generic "catch-all" descriptions of alleged contraband used in the affidavit submitted to the Magistrate to obtain a search warrant does not satisfy the particularity requirement of the Fourth Amendment. A seizure of personal property is "per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." (emphasis added) United States v. Place, 462 U.S. 696, 701, 103 S.Ct. 2637, 2641, 77 L.Ed 2d 110 (1983) (footnote omitted) (citing Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed 231 (1927)). A reviewing court must examine the underlying factual assertions of an affiant where the "... the request is outside the range of the professional competence expected of an officer. If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty." Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092-1099, 89 L.Ed2d 271 (1986). The determination of what constitutes drug paraphernalia clearly was

"outside the scope of the professional competence" of Customs Agent Traci Kline, who submitted the search warrant affidavit. Kline made no claim of expertise and, indeed, admitted her lack of drug paraphernalia knowledge at the trial (T p.77, lines 8-18). She admitted that she did not know what a "hashish head," a "chillum" or an "air-driven pipe" are, even though these items are specifically identified as drug paraphernalia in the statute (T p. 77, l. 1-7). She had never written any articles on what drug paraphernalia is, never attended any lectures on the subject, and did not consider herself an expert in what drug paraphernalia is (T p. 63, l. 24) through p. 64, l. 2). Significantly, she admitted she had no training in the use of tobacco products (T p. 63, l. 24) through p. 64, l. 2) even though these items are specifically excluded from the reach of the drug paraphernalia statute.

The Court of Appeals found that Kline had been a "special agent for the U.S. Customs" for four years and lead agent for Operation Pipe. It did not find that she had any training during those four years in the identification of drug paraphernalia. The Magistrate did not have the requisite facts upon which to issue a search warrant. The one and only reference in the affidavit is the claim of agent Kline that Special Agent Santelli saw items he called drug paraphernalia. Those items were never described or identified. The affidavit in support of the January 21, 1991 search warrant fails to establish probable cause because it lacks any indicia of expertise or reliability of the information provided by the "special agent" from the "Office of Special Investigation of the Department of Defense". The affidavit does not contain any mention of his training or experience in recognizing "drug paraphernalia". The federal drug paraphernalia statute sets forth exemptions which virtually make it impossible for the investigating officer and reviewing magistrate to determine if the items at issue are legal or illegal. The agents in charge of the investigation, likewise lacked the expertise to identify "drug paraphernalia".

Further, the agent who drafted the affidavit for the search warrants omitted any reference to the statutory criteria found in subparagraph (e) of the federal drug paraphernalia statue, or any other "logically relevant" factors to distinguish between lawful and unlawful items. It is undisputed that a great many items which were seized were found not to be drug paraphernalia. This undisputed fact highlights the intrinsic danger in failing to adhere to the constitutionally mandated need to have a magistrate independently review an affidavit for the requisite showing of probable cause.

B. Generic descriptions do not Satisfy Particularity

The question presented for review is the issue of whether the Fourth Amendment prohibition against a lack of particularity may be modified permitting " [a] warrant describing items to be seized in broad and generic terms may be valid if the description is as specific as circumstances and nature of the activity under investigation permit.'" (citation omitted) Appendix A, p. 10.

The decisions of this Court, although not directly in point, provide basic guidelines as to when a generic description is sufficient. When the issue has been raised, it has often been in the context of the First Amendment. See Sanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965) and Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 506, 13 L.Ed.2d 1127 (1961). In Marcus the Court struck down a search warrant authorizing seizure of "obscene materials." The Court struck down that warrant even though the materials to be seized were described in statutory terms. Although the Court's decision in that case concerned encroachment of First Amendment rights, the basic premise of the Marron case was reiterated in condemning a warrant in which there exists " no guide to the exercise of informed discretion..." of the executing officer. 367 U.S. at 732, 81 S.Ct. at 1716. Fundamental to the Court's

concern was what the court perceived as the impossibility of executing the warrant "with any realistic expectation that the obscene might be accurately separated from the constitutionally protected." Id

The warrants at issue in this case fail because they vested unlawful discretion to executing officers. The warrant failed to distinguish or provide the executing agents with criteria for distinguishing any contraband which might be found from the rest of an individual's possessions. Furthermore, there is no indication that the people executing the warrant had any expertise in identifying illegal drug paraphernalia nor that they had any particular knowledge of the statutory criteria.

This selective justice erodes the Constitutional mandate that a warrant particularly describe the things to be seized in order to avoid the prohibitions against general search. The approach in the Tenth Circuit's January 18, 1995 decision seem to be "because it is difficult to define drug paraphernalia, the search warrant does not have to specify what the agents are authorized to search for." In effect, the end is justifying the means. Here the broad definition of the alleged crime under investigation is permitted to broaden, and thereby avoid, the particularity requirement of the Fourth Amendment. This was not the intent of the Framers of the Constitution, nor the Supreme Court in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

To allow a general statutory description of prohibited items to substitute for a particular description of items to be seized in the warrant is merely a legal artifice (expedient) to justify elver searches.

In United States v. Leary, 846 F.2d 592, 600 (10th Cir. 1988) the Tenth Circuit found that the warrant essentially contained no limitation at all on the property to be seized and thus required the suppression of evidence seized thereby. The court in Leary found that the officers had failed to notify the reviewing magistrate that the company had a legitimate business.

Here the existence of a legitimate tobacco business requires greater specificity of items sought to be seized. However, in this case the warrant referenced the statute with no regard to the Defendant's legitimate tobacco business, despite the specific stated exceptions for tobacco products.

The Fourth Amendment requires that a warrant particularly describe both the place to be searched and the person or things to be seized. The description must be specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized.

Whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not. Mere reference to the statute provides no readily ascertainable guidelines for the executing officers as to what items to seize. See United States v. Maxwell, 920 F.2d 1028, 1033 (D.C. Cir. 1990) (wire fraud); United States v. Holaman, 871 F.2d 1496, 1509 (9th Cir. 1988) (fraud); United States v. Fuccillo, 808 F.2d 173, 176-177 (1st Cir.)(stolen goods), cert. denied 482 U.S. 905, 107 S.Ct. 2481, 96 L.Ed.2d 374 (1987); Voss v. Bergsgaard, 774 F.2d 402, 405 (10th Cir. 1985) (conspiracy); United States v. Cardwell, 680 F.2d 75, 77 (9th Cir. 1982) (tax evasion). Absent some limitation curtailing the officers' discretion when executing the warrant, the safeguards of having a magistrate determine the scope of the search is lost. As a consequence, authorization to search without limitation is so broad as to constitute a general warrant.

Without the requisite guidance to the executing officers as to which items were to be seized, there exists in substantial and unjustifiable likelihood of a violation of personal rights. The probability of violation is enhanced by the complex nature of the search in this case and the fact that the premise being searched was a retail outlet for various items as the source of Defendant's economic livelihood. The effect of the execution of the search warrant in this case was to put the Defendant out of business as a practical matter.

CONCLUSION

The Statute does not contain the requisite nexus to interstate commerce. The count of the indictment under which Petitioner was convicted likewise failed to establish the interstate commerce element. The search warrant failed to describe the items sought with sufficient particularity. For all of these reasons, the judgment of the court of appeals should be reversed, and the conviction of the Petitioner be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JANUS INDUSTRIES, doing business as Acapulco Smoke Shop, Defendant - Appellant.	)	No. 94-1074 (D.C. No. 93-CR-233)

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JAMES B. JANUS, Defendant - Appellant.	)	No. 94-1075 (D.C. No. 93-CR-233)

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JANUS INDUSTRIES,	)	No. 94-1113 (D.C. No. 93-CR-233)

doing business as
Acapulco Smoke Shop,

Defendant - Appellant.

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v. No. 94-1114
(D.C. No. 93-CR-233)

JAMES B. JANUS,

Defendant - Appellant.

ORDER
Entered February 27, 1995

Before ANDERSON and KELLY, Circuit Judges, and COOK*, District Judge.

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*Honorable H. Dale Cook, Senior District Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

By
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	Case Nos. 94-1074
	)	94-1075
v.	)	94-1113
	)	94-1114
JANUS INDUSTRIES,	)	(D.C. No. 93-CR-233)
doing business as	)	(D. Colorado)
Acapulco Smoke Shop,	)	
and JAMES B. JANUS,	)	
	)	
Defendants-Appellants.	)	

ORDER AND JUDGMENT*

Before **ANDERSON** and **KELLY**, Circuit Judges, and **COOK,**** District Judge.

Defendant James B. Janus and his company Janus Industries, were charged in a 165-count indictment with sales of drug paraphernalia, 21 U.S.C. §§ 857 and 863, cultivation of marijuana, 21 U.S.C. § 841(a)(1), and money laundering, 21 U.S.C. § 1956(a)(1)(A)(i). The jury returned guilty verdicts as to both Janus and Janus Industries on two of the drug paraphernalia counts, and a guilty verdict as to Mr. Janus on the marijuana count. The parties resolved the money laundering counts by stipulation. Mr. Janus was sentenced to twenty-four months incarceration and required to pay a $50,000 fine. Janus Industries was fined $14,000. The defendants appeal, contending that (1) the district court erred in refusing to grant

defendants' motion to suppress evidence gathered pursuant to the search warrant on the grounds that the underlying affidavit was insufficient to establish probable cause, and the warrant obtained by the officers was unconstitutionally overbroad; (2) the district court erred in concluding that the marijuana found during the search was in plain view; (3) the Drug Paraphernalia Act, 21 U.S.C. § 863, is unconstitutional because it lacks an interstate commerce element; (4) the district court abused its discretion in denying defendants' motion for severance; (5) the district court erred in refusing to give defendants' tendered jury instruction No. 5 which stated that the drug paraphernalia statute does not apply to any person legally authorized to distribute such items; (6) the defendants were denied a fair trial because of the prosecutor's statement in closing argument that the defendants' items were "evil"; and (7) the district court erred at sentencing by granting a two-level increase for obstruction of justice and by failing to grant a two-level reduction for acceptance of responsibility. We affirm.

BACKGROUND

This action arose from a nationwide United States Customs operation ("Operation Pipe ") investigating suspected drug paraphernalia dealerships or "head shops." Special Agent Tracy Lembke led the Customs investigation in both Colorado and Wyoming, during the course of which Customs obtained search warrants for seven different shops in the Denver-metro area that were suspected of selling drug paraphernalia. Under Lembke's direction, search teams were divided up and the several warrants were executed simultaneously on January 21, 1991.

While executing one of these warrants at a shop called Rolling Stone Enterprises ("Rolling Stone") customs agents discovered information suggesting that the Acapulco Smoke Shop located at 3520 Brighton Boulevard, although not originally one of the targeted locations, was also engaged in the drug paraphernalia business. Customs then sent Agent Santelli

to the Acapulco Smoke Shop as a "potential customer" to verify whether they were selling drug paraphernalia on the premises. Agent Santelli reported that he did see drug paraphernalia for sale and that an employee of the Acapulco Smoke Shop, later identified as Janus, told Santelli that he better get what he wanted tonight because the "narcos were out" and he had "trimmed his shelves." R. Vol. 4 at 114.

Based on the information provided by Agent Santelli and the information recovered in investigating Rolling Stone, Agent Lembke then drafted an affidavit for a warrant to search the premises at 3520 Brighton Boulevard. The subsequently issued warrant authorized the agents to search Janus's premises for "[a]ny and all drug paraphernalia" as defined in the drug paraphernalia statute as well as various documents and business records related to the sale of drug paraphernalia or the proceeds from such sales. R. Vol. 1, Doc. 18, Ex. A.

Prior to the issuance and arrival of the search warrant, however, Agent Lembke ordered the two-story building at 3520 Brighton Boulevard secured because she had reason to suspect that evidence may be removed. R. Vol. 3 at 4. Three agents arrived at 6:00 p.m. to "sweep" the premises. The agents found three individuals on the premises, one of whom was Janus. The agents informed the individuals that they were free to leave, and ultimately only Janus remained. At some point after securing the premises but prior to the arrival of the warrant, the agents heard a commotion upstairs in the bedroom area; Janus was apparently moving things around. An agent asked Janus what was going on, and Janus reportedly said either "nothing" or "lied." R. Vol. 7 at 810.

By the time agent Lembke arrived with the warrant later that evening, approximately twenty-five federal agents were on the premises to help conduct the search. Agent Lembke went directly to Janus and presented him with a copy of the warrant, reviewed what the agents were there for, and advised him of his rights. Following a video taping of the premises, the agents began searching.

Among other things, the search uncovered a hydroponic garden or grow area in a partly hidden closet upstairs. The closet contained a grow light, watering system, and was panelled with styrofoam. There were no plants, but the lights were on and the soil was moist. Meanwhile, Agent Burke, an IRS agent who had been assigned to look for documents and financial records in the bedroom area, noticed a dresser that had what appeared to be a concealed bottom drawer. Upon opening the drawer he found seven marijuana plants with moist dirt still clinging to the roots.

DISCUSSION

I. Motion to Suppress: Validity of Search Warrant

Before trial Janus moved to suppress all evidence derived from the search on January 21, 1991, on the grounds that (1) Agent Lembke's underlying affidavit was insufficient to establish probable cause to search Janus's premises and (2) the warrant was overbroad because it failed to state with particularity the things to be seized. The district court denied that motion following a hearing.

In reviewing the denial of a motion to suppress, we must "accept the trial court's findings of fact unless clearly erroneous." United States v. Dahlman, 13 F.3d 1391, 1394 (10th Cir. 1993), cert. denied, 114 S. Ct. 1575 (1994); United States v. Wicks, 995 F.2d 964, 968 (10th Cir.), cert. denied, 114 S. Ct. 482 (1993); United States v. Carr, 939 F.2d 1442, 1443 (10th Cir. 1991). However, "[w]e review de novo the 'ultimate determination of Fourth Amendment reasonableness.'" United States v. Little, 18 F.3d 1499, 1503 (10th Cir. 1994) (quoting United States v. Allen, 986 F.2d 1354, 1356 (10th Cir. 1993)). We must view the evidence in the light most favorable to the government. Wicks, 995 F.2d at 969; Carr, 939 F.2d at 1443.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV;

United States v. Mesa-Rincon, 911 F.2d 1433, 1436 (10th Cir. 1990).

A. Probable Cause

The existence of probable cause is a common sense standard. Wicks, 995 F.2d at 972. The Supreme Court has stated that "probable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232 (1983). "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him... there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. at 238.

A reviewing court must give great deference to the magistrate's determination of probable cause, United States v. $149,442.43 in United States Currency, 965 F.2d 868, 872 (10th Cir. 1992), and we should uphold that conclusion if the "totality of the information contained in the affidavit provided a substantial basis for finding there was a fair probability that evidence of criminal activity would be found" at the Acapulco Smoke Shop. United States v. Hager, 969 F.2d 883, 887 (10th Cir.), cert. denied, 113 S. Ct. 437 (1992).

Janus argues that the only information the magistrate had suggesting that wrongdoing would be found in the Acapulco Smoke Shop was Agent Santelli's "bald assertion" that he saw "drug paraphernalia." Janus claims that this mere conclusion, without specific examples of precisely what Santelli saw, is insufficient to justify the issuance of a search warrant.

The affidavit in support of the January 21, 1991 search warrant indicates that Agent Santelli reported seeing "a variety of items defined as drug paraphernalia under [the Drug Paraphernalia Statute] " for sale at 3520 Brighton Boulevard. Although Agent Santelli's description was cast in statutory terms, attachment two of the application for the warrant recites subsection (d) of the statute which describes "drug paraphernalia" in great detail and provides several examples.

Moreover, the affidavit contained additional information providing further indicia supporting the conclusion that drug paraphernalia would be found on the premises. For example, the affidavit provided extensive background information related to the investigation of Rolling Stone Enterprises. It stated that the agents had lawfully searched Rolling Stone Enterprises, had seized drug paraphernalia, and had recovered information suggesting that Acapulco Smoke was a supplier for Rolling Stone and one of the largest distributors in Colorado. The affidavit provided specific examples of the paraphernalia found during the Rolling Stone investigation--indicating that the agents were in fact aware of what constitutes "drug paraphernalia"--and Agent Santelli stated that the drug paraphernalia he saw at Acapulco Smoke was substantially the same as that identified at Rolling Stone. R. Vol. 4 at 112. Furthermore, Agent Santelli's conclusion that there was "drug paraphernalia" on the premises was additionally buttressed by Janus's incriminating statement that he was "trimming his shelves" because the "narcos are out." Id. at 114. Finally, the affiant's experience and expertise may also be considered in the magistrate judge's calculus, see Wicks, 995 F.2d at 972, which, in Agent Lembke's case, consisted of four years as a special agent for U.S. Customs, and assignment to lead Operation Pipe in Wyoming and Colorado--a program directed specifically toward the investigation of drug paraphernalia.

These facts provide sufficient probable cause to support the magistrate's determination that a fair probability existed that drug paraphernalia was for sale at the Acapulco Smoke Shop. Thus, we affirm the district court's conclusion that probable cause supported the issuance of the search warrant.

B. Particularity

Janus next asserts that the warrant fails to meet the second part of the Fourth Amendment's requirement. He contends that the language regarding "drug paraphernalia" was mere "boilerplate" statutory language, and that the statute's catchall provision is so overbroad as to allow general rummaging through his property. He argues that the agents had "no

direction on how to tell what items were drug paraphernalia and which were not." Appellants' Br. at 18.

The Fourth Amendment's requirement that a warrant particularly describe the things to be seized prevents a "general, exploratory rummaging in a person's belongings," Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971), and "'makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.'" Stanford v. Texas, 379 U.S. 476, 485 (1965) (quoting Marron v. United States, 275 U.S. 192, 196 (1927)); see also United States v. Medlin, 842 F.2d 1194, 1199 10th Cir. 1988); Voss v. Bergsgaard, 774 F.2d 402, 404 (10th Cir. 1985). "The particularity requirement [also] ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." Id. at 404. We review de novo the legal question of whether a warrant is overbroad. Wicks, 995 F.2d at 973; United States v. Harris, 903 F.2d 770, 774 (10th Cir. 1990); United States v. Leary, 846 F.2d 592, 600 (10th Cir. 1988). The test applied to the description of the items to be seized is a practical one. Id. "A description is sufficiently particular when it enables the searcher to reasonably ascertain and identify the things authorized to be seized." United States v. Wolfenbarger, 696 F.2d 750, 752 (10th Cir. 1982).

The warrant in this case described drug paraphernalia in terms of subsection (d) of the Drug Paraphernalia Act. Subsection (d), which was reproduced as attachment number two to the warrant, defines drug paraphernalia extensively and includes a thorough list of various types of drug paraphernalia. See 21 U.S.C. § 863(d). Moreover, although subsection (d) does contain a catchall provision which includes among drug paraphernalia "any and all other equipment . . . primarily intended for or designed for use in . . . producing . . . ingesting . . . or otherwise introducing a controlled substance into the human body," the provision is sufficiently limited by the language "primarily intended for" and "designed for use." Id.

We have previously stated that "[a] warrant describing 'items to be seized in broad and generic terms may be valid if the description is as specific as circumstances and nature of the activity under investigation permit.'" Wicks, 995 F.2d at 973 (quoting Harris, 903 F.2d at 775). Moreover, where the subject of the search is related to the illegal drug business, we have repeatedly upheld search warrants cast in comparably broad terms. See id. (listing cases). "'When the circumstances of the crime make an exact description of the fruits and instrumentalities a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking.'" United States v. Emmons, 24 F.3d 1210, 1216 (10th Cir. 1994) (quoting Harris, 903 F.2d at 775). The type of criminal activity under investigation in the present case--a drug paraphernalia business-makes it difficult to list with great particularity the precise items desired to be seized which evidence such activity. Consequently, we conclude that the warrant in question, although describing the paraphernalia in statutory terms, was sufficiently particular under these circumstances. It was limited to materials related to the use of illegal drugs, and to documents and other items that went to that intended use. The district court therefore correctly denied Janus's motion to suppress evidence seized pursuant to the warrant.

II. Motion to Suppress: Marijuana

Janus contends that the district court erred in refusing to grant his motion to suppress the marijuana found during the search. Janus argues that the marijuana was outside the scope of the warrant and that the district court erroneously concluded that it was in "plain view."

The warrant did not authorize the agents to search for marijuana. However, where the government has a warrant to search a given area for specific objects, and in the course of the search come across some other article of incriminating character, the plain view doctrine may permit the government to seize the evidence without a warrant. See Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (plurality opinion). We note the

caution, however, with which we must apply the plain view doctrine: "[I]t is important to keep in mind that, in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure." Id.

To justify a warrantless seizure based on plain view, therefore, we have held that three conditions must be satisfied. United States v. Naugle, 997 F.2d 819, 822 (10th Cir.), cert. denied, 114 S. Ct. 562 (1993). First, the seizing agent must not have violated the Fourth Amendment "'in arriving at the place from which the evidence could be plainly viewed.'" Id. (quoting Horton v. California, 496 U.S. 128, 136 (1990). Second, "the item must not only be in plain sight, but its incriminating character must also be immediately apparent." Id. (quoting Horton, 496 U.S. at 136). Third, "'not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.'" Id. (quoting Horton, 496 U.S. at 137).

We are satisfied that these elements have been met under the present circumstances, and thus the district court properly denied the motion to suppress. First, the district court found that the warrant permitted the agents to search the second floor and the bedroom area for drug paraphernalia and documents. R. Vol. 3 at 138-39. Additionally, the court found that the drawer containing the marijuana was a drawer where documents could have been located, and in fact, documents had been found in the bedroom. Id. at 139. These findings can hardly be considered clearly erroneous. Naugle, 997 F.2d at 822 ("'A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.'" (quoting United States v. Ross, 456 U.S. 798, 820-21 (1982))). Second, the incriminating nature of the evidence was immediately apparent to Agent Burke who testified that he recognized the plants to be marijuana as soon as he opened the drawer. R. Vol. 5 at 204. Third, Agent Burke had a lawful right of access to the marijuana. The marijuana was

in a drawer where Agent Burke was permitted to look, and he did nothing more than open the drawer.

III. Drug Paraphernalia Act

Janus next asserts that the current drug paraphernalia statute violates the Tenth Amendment because it does not contain an interstate commerce element and lacks specific congressional findings "that the sales of drug paraphernalia affect interstate commerce." R. Supp. Vol. 1, Doc. 2. We review de novo the issue of whether § 863 represents a legitimate exercise of congressional authority. Johnston v. Cigna Corp., 14 F.3d 486, 489 (10th Cir. 1993); United States v. Murphy, 977 F.2d 503, 504 (10th Cir. 1993).

Article I, section 8, clause 3 of the Constitution confers upon Congress the power "[t]o regulate Commerce... among the several states" and clause 18 of the same article grants Congress the power "[t]o make all laws which shall be necessary and proper for the carrying into execution the foregoing powers." Under its extensive commerce power, Congress may regulate purely intrastate activities that affect interstate commerce, Fry v. United States, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity affects commerce among the States or with foreign nations."), and need not require proof of a nexus between the activity and interstate commerce. See, e.g., Perez v. United States, 402 U.S. 146, 153 (1971) (upholding 18 U.S.C. §§ 891-894, which prohibit extortionate credit transactions but do not expressly require proof of an interstate commerce nexus); see also United States v. Lane, 883 F.2d 1484, 1492 (10th Cir. 1989) (upholding 18 U.S.C. § 245(b)(2)(C), which prohibits interference with applications for or enjoyment of private employment because of race, color, religion, or national origin but does not expressly require proof of an interstate commerce requirement), cert. denied, 110 S. Ct. 872 (1990). Janus apparently concedes this, but argues that § 863 is unconstitutional because the legislative history for the specific statute does not contain any explicit or implicit congressional

findings that sales of drug paraphernalia affect interstate commerce. R. Supp. Vol. 1, Doc. 2.

Janus's argument is foreclosed by prior case law in which we have repeatedly concluded that "the absence of formal findings concerning the effect on interstate commerce . . . does not prevent Congress from regulating under the Commerce Clause." Morgan v. Secretary of Housing & Urban Dev., 985 F.2d 1451, 1455 (10th Cir. 1993); Lane, 883 F.2d at 1492 ("Congress is not required to make 'particularized findings in order to legislate.'" (quoting Perez, 402 U.S. at 156). And our holdings in Morgan, Lane, and the case at bar are entirely consistent with the Supreme Court's Commerce Clause jurisprudence. See, e.g., Perez, 402 U.S. at 156 (providing Congress need not make particularized findings in order to legislate); Katzenbach v. McClung, 379 U.S. 294, 299 (1964) (same); see also Fullilove v. Klutznick, 448 U.S. 448, 503 (1980) (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.").

Additionally, the Supreme Court has emphasized that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." Perez, 402 U.S. at 154 (quoting Maryland v. Wirtz, 392 U.S. 183, 193 (1968)); see also United States v. Smaldone, 485 F.2d 1333, 1342 (10th Cir. 1973) ("[A]ctivities within a regulated class of activities which do not exceed the reach of federal power under the Commerce Clause need not be shown, in each individual case, to affect interstate commerce."), cert. denied, 416 U.S. 936 (1974). Regarding the case at bar, Congress frequently has relied upon the Commerce Clause as authority for the enactment of statutes regulating drug trafficking, see, e.g., 21 U.S.C. § 801, and courts have consistently upheld congressional regulation of the class of intrastate drug activities. See, e.g., United States v. Visman, 919 F.2d 1390, 1393 (9th Cir. 1990), cert. denied, 112 S. Ct. 442

(1991); United States v. Montes-Zarate, 552 F.2d 1330, 1331 (9th Cir. 1977) (per curium), cert. denied, 435 U.S. 947 (1978). Therefore, because intrastate sales of drug paraphernalia are part of this properly regulated class, it follows that the drug paraphernalia statute is a proper exercise of Congressional power. See Lane, 883 F.2d at 1492 ("When Congress enacts a statute under its commerce power, it is not constitutionally obligated to require proof beyond a reasonable doubt that each individual act in the class of activities regulated had an effect on interstate commerce.").

Furthermore, the drug paraphernalia statute which Janus challenges is part of the Comprehensive Drug Abuse Prevention and Control Act of Title 21. In the legislative history of that act, Congress specifically found that "Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. § 801(6). We regard drug paraphernalia to be part and parcel of the "incidents of the traffic in controlled substances," and see no reason why Congress could not rely on that connection to support § 863. Cf. Lane, 883 F.2d at 1492 (concluding that although Congress had made no interstate commerce findings in 1988 when it enacted 18 U.S.C. § 245, it had heard extensive evidence on the burdens racial discrimination places on interstate commerce in connection with enacting the 1964 Civil Rights Act on which Congress could have relied); see also United States v. Edwards, 13 F.3d 291, 294 (9th Cir. 1993) (suggesting Congress was not required to conduct additional hearings and make new findings regarding a specific statute which would merely repeat prior findings). Therefore, we conclude that Congress possessed power under the Commerce Clause to enact § 863 and that Congress validly invoked that power.

IV. Joinder/Severance

Janus next contends that joinder of the marijuana count with the paraphernalia counts was improper under Fed. R. Crim. P. 8(a), or, alternatively, that the trial court abused its discretion in denying severance under Fed. R. Crim. P. 14.

A question of misjoinder under rule 8 is a question of law, subject to de novo review. United States v. Hollis, 971 F.2d 1441, 1456 (10th Cir. 1992), cert. denied, 113 S. Ct. 1580 (1993); United States v. Cardall, 885 F.2d 656, 667 (10th Cir. 1989). According to Rule 8(a) joinder of offenses is proper if the offenses are "of the same or similar character." United States v. Holland, 10 F.3d 696, 699 (10th Cir. 1993), cert. denied sub nom. Kelly v. United States, 114 S. Ct. 739 (1994); United States v. Sturmoski, 971 F.2d 452, 460 (10th Cir. 1992). And we have previously stated that Rule 8 "is construed broadly to allow liberal joinder to enhance the efficiency of the judicial system." United States v. Hopkinson, 631 F.2d 665, 668 (10th Cir. 1980), cert. denied, 450 U.S. 969 (1981); see United States v. Scott, 659 F.2d 585, 588 (5th Cir. Unit B 1981) (providing rule governing joinder is to be broadly construed in favor of initial joinder), cert. denied, 459 U.S. 854 (1982); Haggard v. United States, 369 F.2d 968, 973 (8th Cir. 1966) (stating broad interpretation of rule governing joinder is encouraged in the interest of more efficient administration of criminal trials), cert. denied sub nom. Alley v. United States, 386 U.S. 1023 (1967). In the present case, Count 161, knowingly engaging in the manufacture of marijuana plants, is a drug offense in violation of the Drug Abuse Prevention and Control Act of Title 21. Counts 2 and 3, knowingly and intentionally selling and offering for sale drug paraphernalia, are also drug offenses in violation of the same comprehensive act. We conclude, therefore, that the joinder of Count 161 was proper under Rule 8(a) because it was an offense of the "same or similar character." Cf. United States v. Fortenberry, 919 F.2d 923, 925 (5th Cir. 1990) (concluding that because both charges were for weapons violations they were of the same or similar character within the meaning of the rule governing joinder of claims), cert. denied, 499 U.S. 930 (1991).

However, even in the absence of a misjoinder under Rule 8(a), the court may order the separate trials of counts "'[i]f it appears that a defendant . . . is prejudiced by a joinder of offenses.'" United States v. Levine, 983 F.2d 165, 167 (10th Cir. 1992) (quoting Fed. R. Crim. P. 14). "In deciding on a motion

for severance, the district court has a duty to weigh the prejudice resulting from a single trial of counts against the expense and inconvenience of separate trials." Hollis, 971 F.2d at 1456; Cardall, 885 F.2d at 668. "The decision whether to grant or deny severance is within the sound discretion of the trial court, and will not be disturbed on appeal unless there is an affirmative showing of an abuse of discretion." Id. at 667. "The burden of the defendant to show an abuse of discretion in this context is a difficult one." United States v. Valentine, 706 F.2d 282, 290 (10th Cir. 1983).

Before the district court, Janus attempted to justify the severing of counts because "no reasonable jury would be able to decide the drug paraphernalia counts alone when the marihuana count is tried along with it." Defs' Mot. for Severance, R. Vol. 1, Doc. 28. This rationale, however, does not mandate a severance. "'Neither a mere allegation that defendant would have a better chance of acquittal in a separate trial, nor a complaint of the 'spillover effect' . . . is sufficient to warrant severance.'" Levine, 983 F.2d at 167 (quoting United States v. Bailey, 952 F.2d 363, 365 (10th Cir. 1991)) (alteration in original). Moreover, as the district court found, had separate trials been granted, the evidence would likely have been admissible anyway under Fed. R. Evid. 404(b) as showing intent. See Hollis, 971 F.2d at 1457; see also United States v. Rabbitt, 583 F.2d 1014, 1022 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). The charges against Janus mainly dealt with alleged drug paraphernalia. Consequently, Janus's intent was paramount. Janus claimed that his business was a legitimate, non-drug business as far as he knew; therefore, the presence of a hidden garden and marijuana plants would be both relevant and material on other counts. Under these circumstances we conclude that the district court did not abuse its discretion in refusing to sever the counts.

V. Prosecutorial Misconduct in Closing Argument

Janus argues that certain remarks of the prosecutor during closing argument were so prejudicial as to deny him a fair trial. During the rebuttal phase of closing argument the

prosecution said to the jury: "Make no mistake about the intent of Mr. Janus. Make no mistake. This [sic] items are evil from their conception and they were going to be used for an evil purpose." R. Vol. 8 at 985. Janus objected, requesting that the jury be instructed to disregard the "defamatory language about things being evil." Id. The district judge, in overruling the objection, stated: "It's a legitimate argument . . . I think [the prosecution] is using [evil] interchangeably for the word illegal as I understand it." Id. On appeal Janus claims that the prosecution's comment was highly prejudicial and caused incurable damage.

We agree with the district court that the prosecutor's comment was not improper in context. The remark on its face was fair argument. Furthermore, the prosecutor's comment might be characterized as invited comment. In its closing argument, as well as throughout trial, defense counsel maintained that Janus was unaware the paraphernalia he was selling was illegal. See, e.g., R. Vol. 8 at 966. The prosecution's comment on rebuttal, therefore, appears to have been an attempt to address one of the main factual issues in the case--that Janus knew he was selling drug paraphernalia. We have repeatedly recognized that considerable latitude is given the prosecutor in closing argument in replying to an argument raised by defense counsel's closing statement. United States v. Espinosa, 771 F.2d 1382, 1401 (10th Cir.), cert. denied sub nom. Foreman v. United States, 474 U.S. 1023 (1985); United States v. Dickey, 736 F.2d 571, 596 (10th Cir. 1984), cert. denied sub nom. Beasley v. United States, 469 U.S. 1188 (1985).

Assuming arguendo that the comment was improper either intrinsically or as invited comment, it did not deprive Janus of a fair trial because it was harmless. The comment was singular and isolated. See United States v. Pena, 930 F.2d 1486, 1491 (10th Cir. 1991); United States v. Record, 873 F.2d 1373, 1376 (10th Cir. 1989). And the record consists of ample evidence, independent of the alleged misconduct, which supports the jury's verdict. The harmlessness was further bolstered by the trial court's instruction to the jury that statements and arguments

by the attorneys were not evidence and were not to be considered in rendering a verdict. R. Vol. 8 at 924; see Pena, 930 F.2d 1491.

VI. Defendants' Jury Instructions

Next, Janus asserts that the trial judge erred in refusing to give his tendered instruction No. 5 on his defense theory that "he believed that his conduct was authorized by Federal, State and local law." Appellants' Opening Br. at 43.

Janus's argument on this point suffers from the deficiency that he fails to cite where in the record the proper objection was made. See Fed. R. App. P. Tenth Cir. R. 28.2(d); see also Jetcraft Corp. v. Flight Safety Int'l, 16 F.3d 362, 366 (10th Cir. 1993); McGinnis v. Gustafson, 978 F.2d 1199, 1201 (10th Cir. 1992); Moore v. Subaru of Am., 891 F.2d 1445, 1448 (10th Cir. 1989). The cited portion of the record does not contain any objection by the defendant or any court ruling; it contains only a brief discussion between defense counsel and the trial judge regarding the tendered instruction. Furthermore, our independent review of the record reveals that the defendant in fact failed to preserve the issue for appeal. Although preliminary discussions between the trial judge and counsel suggested that defendants' tendered instruction No. 5 might be included in the final instructions to the jury, see R. Vol. 8 at 901, the court apparently excluded this instruction in its final version. Despite this omission, and after the court had provided defense counsel with a copy of its jury instructions, defense counsel clearly stated that he had no objections. Accordingly, we find defendant has waived this issue on appeal. Janus has not asked us to address this issue under the plain error standard, and we decline to do so sua sponte.

Alternatively, we conclude in any event that there was no error in failing to give the defendants' tendered instruction. When reviewing a claim of error relating to jury instructions, we review the instructions as a whole. United States v. Haar, 931 F.2d 1368, 1371 (10th Cir. 1991). "'Although a criminal defendant is entitled to an instruction regarding his theory of the case, a trial judge is given substantial latitude and discretion in

tailoring and formulating the instructions,'" id. (quoting United States v. Pack, 773 F.2d 261, 267 (10th Cir. 1985)), and the court need not follow the exact language of a defense instruction "as long as the court's instructions correctly state the law and fairly and adequately cover the issues presented. Pack, 773 F.2d at 267; United States v. Jenkins, 701 F.2d 850, 858 (10th Cir. 1983). Here we are satisfied that the charge as a whole adequately instructed the jury, taking defendant Janus's theory into account. The district court had, during trial, instructed the jury that while a patent was not a license, it could be relevant as to Janus's intent. R. Vol. 5 at 365-66. And, the instructions given included a standard good faith instruction which noted that good faith was a complete defense, and the burden was on the Government to disprove it. R. Supp. Vol. II at 31-32.

VII. Obstruction of Justice & Acceptance of Responsibility

Finally, Janus contends that the district court erred in enhancing his offense level by two for obstruction of justice pursuant to United States Sentencing Commission, Guidelines Manual §3C1.1, and by failing to grant a two-level reduction for acceptance of responsibility pursuant to USSG §3E1.1. Once again, however, the defendants have failed to include and reference the portion of the record wherein their objections, properly preserving these issues for appeal, may be found. Because this is required by Tenth Circuit Rules 10.3.2(a) and 28.2 (c), (d), we leave the district court's determination undisturbed. See Jetcraft, 16 F.3d at 366; McGinnis, 978 F.2d at 1201.

Assuming arguendo that these sentencing issues were properly presented, we would reach the same conclusion. With regards to the obstruction of justice issue, the guidelines require a two-point increase "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." USSG §3C1.1. We review the district court's factual determinations as to the obstruction of justice under the clearly erroneous standard, Hollis, 971 F.2d at 1460;

United States v. Urbanek, 930 F.2d 1512, 1514 (10th Cir. 1991), and we review de novo questions involving legal interpretations of the Sentencing Guidelines. United States v. Gardiner, 931 F.2d 33, 34 (10th Cir. 1991); United States v. Davis, 912 F.2d 1210, 1211 (10th Cir. 1990).

The district court gave two reasons for the enhancement. First, "[Janus] removed items of merchandise from the premises of his business after receiving information that other businesses had been raided" and, expecting an imminent raid on his premises, Janus "wished to conceal items of alleged paraphernalia which might be seized." R. Vol. 1, Doc. 46 at 2. Second, regarding the marijuana growing charge, "he uprooted plants from his indoor garden and attempted to conceal them in the bottom drawer of a dresser." Id. Based on our review of the record, we cannot conclude that these factual findings are clearly erroneous. Having made these findings, the district court correctly applied the guidelines. The guidelines commentary makes clear that the enhancement was intended to apply where a defendant engages in "destroying or concealing . . . evidence that is material to an official investigation . . . (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so." USSG §3C1.1 Application note 3(d). This is precisely what the district court found to have happened here. Therefore, we find no error.

Regarding the argument that Janus was improperly denied a two point downward adjustment for his acceptance of responsibility, the guidelines provide that the offense level should be reduced "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." USSG §3E1.1 The district court's determination of acceptance of responsibility is a question of fact that is reviewed under the clearly erroneous standard. Hollis, 971 F.2d at 1459; United States v. Hernandez, 967 F.2d 456, 459 (10th Cir. 1992); United States v. Whitehead, 912 F.2d 448, 451 (10th Cir. 1990). As such, the trial court's determination of whether Janus has accepted responsibility is subject to great deference on review and should not be disturbed

unless it is without foundation United States v. Amos, 984 F.2d 1067, 1071-72 (10th Cir. 1993). Janus argues that this is an instance where a defendant who goes to trial nonetheless should receive an adjustment of acceptance of responsibility because he went to trial primarily to preserve an argument that the drug paraphernalia statute is unconstitutional. See USSG §3E1.1, Application note 2. The district court judge, however, reached a contrary conclusion: "I do not believe [Mr. Janus] . . . went to trial only to preserve the constitutional point. His statement at sentencing suggests a continued belief that he did nothing wrong and indicates that his main regret is the fact that he got caught." R. Vol. 1, Doc. 46 at 2. Having reviewed the record, we conclude that the denial of reduction for defendant's alleged acceptance of responsibility was not clearly erroneous.

The judgment of conviction and sentence imposed by the district court are AFFIRMED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

** The Honorable H. Dale Cook, Senior District Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

1 Janus attempts to raise for the first time in his reply brief on appeal that the affidavit was not attached to the warrant. We decline to address this issue because it was neither considered and ruled upon by the district court nor raised in the opening

brief. See Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 720-22 (10th Cir. 1993); F.D.I.C. v. Daily, 973 F.2d 1525, 1530 (10th Cir. 1992).

2 21 U.S.C. § 863(a)(1) provides: "It shall be unlawful for any person--(1) to sell or offer for sale drug paraphernalia."

3 At the jury instruction conference the following exchange occurred:

> THE COURT: Instruction number 5 is the so-called patent defense. I do not intend to give that, Mr. Eldridge. I don't think that a patent is something you can hang your hat on.
>
> MR. ELDRIDGE: I think that also applies to the Customs importation, Judge.
>
> . . . .
>
> THE COURT: Well, I don't think that the mere fact that an article has cleared Customs or evidently has cleared Customs by virtue of a stamp is a complete defense. We can consider that. Mr. Janus testified that he honestly thought that, and I suppose that's part of his good faith defense. So, I'll--I'll give it then, but I don't--I don't think the fact that an item has cleared Customs makes it or gives it an automatic exception.

R. Vol. 8 at 901.

4 During the afternoon session of the instruction conference the following exchanges occurred:

> THE COURT: Call the jury in, please.
>
> MR. ELDRIDGE: Excuse me, Your Honor. Before you do that, I've looked at all the instructions. I don't have any objection the way they are
>
> THE COURT: All right.
>
> MR. ELDRIDGE:--with the exception of number 2.5 which appears on page 16. And I just didn't know why you were going to give that one, the presumption of regularity.

. . . .

THE COURT: Would counsel approach the bench? Does government have any objections on instructions?

MS. TAFOYA: No, Your Honor.

THE COURT: Does the government have any objections to the instructions as read?

MS. TAFOYA: No.

THE COURT: Does the defendant have any objections to the instructions?

MR. ELDRIDGE: No.

THE COURT: Any objections to the instructions as read?

MR. ELDRIDGE: No.

R. Vol. 8 at 998-99.

UNITED STATES DISTRICT COURT
District of Colorado

UNITED STATES OF AMERICA

v. Case Number 93-CR-233-02

JANUS INDUSTRIES
d/b/a Acapulco Smoke Shop

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JANUS INDUSTRIES, was represented by Wade Eldridge.

The defendant was found guilty on count(s) 1 and 2 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense
21 USC 863(a) and 18 USC 2	UNLAWFUL SALE OF DRUG PARAPHERNALIA

Date Offense Concluded	Count Number(s)
11/25/91	1, 2

As pronounced on January 21, 1994, the defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $400.00, for count(s) 1 and 2, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this _____ day of _____, 19__

_____
EDWARD W. NOTTINGHAM, Judge
United States District Court

Defendant's address: 3520 BRIGHTON BOULEVARD, DENVER, COLORADO 80216
Defendant: JANUS INDUSTRIES
Case Number: 93-CR-233-02

PROBATION

The defendant is hereby placed on probation for a term of 5 year(s).

While on probation, the defendant shall not commit another federal, state, or local crime; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. Defendant shall provide the Probation Officer access to any requested financial information.

2. Defendant shall pay a fine of $14,000.00 as set forth in this judgment.

3. No restitution is ordered.

STANDARD CONDITIONS OF PROBATION

While the defendant is on probation pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history-or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: JANUS INDUSTRIES
Case Number: 93-CR-233-02

FINE

The defendant shall pay a fine of $14,000.00.

This fine shall be paid immediately or in equal monthly installments of $270.00 during term of probation.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

UNITED STATES DISTRICT COURT
District of Colorado

Case Number 93-CR-233-01

UNITED STATES OF AMERICA

v.

JAMES B. JANUS

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JAMES B. JANUS, was represented by Wade Eldridge.

The defendant was found guilty on count(s) 1, 2 and 3 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Tide & Section	Nature of Offense
21 USC 863(a)(1) and 18 USC 2	UNLAWFUL SALE OF DRUG PARAPHERNALIA
21 USC 841(a)(1) and 18 USC 2	AID AND ABET THE MANUFACTURE OF MARIJUANA

Date Offense Concluded	Count Number(s)
11/25/91	1, 2
1/29/913	3

As pronounced on January 21, 1994, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $150.00, for count(s) 1, 2 and 3, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this _____ day of _____, 19__.

_____
EDWARD W. NOTTINGHAM, Judge
United States District Court

Defendant's SSN: 064-38-9412
Defendant's Date of Birth: August 7, 1947
Defendant's address: 3520 BRIGHTON BOULEVARD, DENVER, COLORADO 80216

Defendant: JAMES B. JANUS
Case Number: 93-CR-233-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 24 months.

The Court makes the following recommendations to the Bureau of Prisons: Defendant shall receive credit for one day

spent in Federal custody. The Court further recommends defendant be designated to FPC, Englewood.

The defendant shall surrender to the United States Marshal for this district at 10:25 a.m. on January 21, 1994.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____ with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: JAMES B. JANUS
Case Number: 93-CR-233-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall not possess a firearm or destructive device; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. Defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. Defendant shall participate in a program of testing and treatment for drug abuse as directed by the Probation Officer until released from the program by the Probation Officer. Defendant shall refrain from excessive use of alcohol during treatment. Defendant shall pay the costs of treatment.

3. Defendant shall provide the Probation Officer access to any requested financial information.

4. Defendant will not incur new credit charges or open additional lines of credit without the approval of the Probation Officer, unless he is in compliance with all periodic payment obligations imposed pursuant to the Court's judgment and sentence.

5. Defendant shall pay a fine of $50,000.00 as set forth in this judgment.

6. No restitution is ordered.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: JAMES B. JANUS

Case Number: 93-CR-233-01

FINE

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

The defendant shall pay a fine of $50,000.00.

This fine shall be paid immediately or in equal monthly installments of $2,100.00 per month during term of supervised release.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 93-CR-233

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES B. JANUS and
JANUS INDUSTRIES,
d/b/a Acapulco Smoke Shop.

INDICTMENT
18 U.S.C. § 2
18 U.S.C. § 545
18 U.S.C. § 1956 (a)(1)(A)(i)
21 U.S.C. § 841(a)(1)
21 U.S.C. § 857(a)(1)
21 U.S.C. § 863(a)(1)

THE GRAND JURY CHARGES THAT:
AT ALL TIMES MATERIAL TO THIS INDICTMENT:

1. The Defendant, JANUS INDUSTRIES d/b/a Acapulco Smoke Shop, located in the District of Colorado, was a corporation incorporated in the State of Colorado and a wholesaler, manufacturer and retailer of drug paraphernalia and related items in the District of Colorado and elsewhere.

2. The Defendant, JAMES B. JANUS, was the president and sole owner of JANUS INDUSTRIES d/b/a Acapulco Smoke Shop.

3. For purposes of this indictment, the term "drug paraphernalia" means:

a. any equipment, products, and materials which are primarily intended and designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body controlled substances, possession of which is unlawful under the Controlled Substances Act [21 U.S.C. §801 et seq.] including but not limited to items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, and amphetamines into the human body, such as:

1) Metal, wooden, acrylic, glass, stone, plastic and ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

2) Water pipes;

3) Carburetion tubes and devices;

4) Roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

5) Miniature spoons with level capacities of one-tenth cubic centimeter or less;

6) Chamber pipes;

7) Carburetor pipes;

8) Chillums;

9) Bongs; and

10) Ice pipes or chillers;

b. In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

1) instructions, oral or written, provided with the item concerning its use;

2) descriptive materials accompanying the item which explain or depict its use;

3) national and local advertising concerning its use;

4) the manner in which the item is displayed for sale;

5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

6) direct or circumstantial evidence of the ratio of sales of the items(s) to the total sales of the business enterprise;

7) the existence and scope of legitimate uses of the item in the community; and

8) expert testimony concerning its use;

c. Exceptions include:

1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or

2) any item that, in the normal lawful course of business is imported, exported, transported, or sold through the mail or by any other means, and primarily or traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

4. The scheme to sell drug paraphernalia engaged in by JAMES B. JANUS and JANUS INDUSTRIES, d/b/a Acapulco Smoke Shop proceeded as follows:

From on or about August 1988 through November 25, 1991,

a. Defendants ordered various items of drug paraphernalia from suppliers outside the state and district of Colorado including Pacific Laboratories, California Trifles, Fine Line Products, Award Distributing and others through catalogues of the suppliers.

b. The orders were originally placed by the generation of a uniquely numbered JANUS INDUSTRIES Purchase Invoice.

c. The product was shipped from the supplier located in a state outside Colorado via United Postal Service or other interstate carrier, which at all times relevant was a facility and conveyance in interstate

commerce, to JANUS INDUSTRIES at 3520 Brighton Blvd., Denver, Colorado.

d. When the product was received, the Defendants issued or caused to be issued a uniquely numbered check drawn on a JANUS INDUSTRIES bank account and payable to the supplier for the merchandise.

e. The check was sent from JANUS INDUSTRIES in Denver, Colorado, via United States mail, a facility of interstate commerce, to the out-of-state supplier for payment for drug paraphernalia.

f. At all relevant times, the Defendants created and caused to be published a catalogue entitled "JANUS INDUSTRIES INC." and depicting various items of drug paraphernalia offered for sale and transportation by JANUS INDUSTRIES.

g. The merchandise was then given a JANUS INDUSTRIES stock number comporting to items in the JANUS INDUSTRIES catalogue.

h. The Defendants then sold the recently purchased drug paraphernalia to customers Cosmic Creations, Home Sweet Home, Rolling Stone, Heads of State, Independent Records and Tapes, Mike's Imports, Outer Limits, Mellow Yellow, Silverstone and others by generating a uniquely numbered sales invoice number.

i. When the payment was received corresponding to the sales invoice number, the funds were deposited into the same JANUS INDUSTRIES account which had originally been used to pay for the item from the out of state supplier.

j. The funds accumulated in the bank account were then utilized to purchase more drug paraphernalia from Pacific Laboratories, California Trifles, Fine Line Products and others.

k. It was further part of the scheme that, in an attempt to avoid and evade the law and to continue to sell drug paraphernalia in violation of the law, the Defendants created a marketing strategy consisting of various ploys and strategies to avoid and evade the drug paraphernalia statutes, including the federal drug paraphernalia statute, such as:

1) specific vocal or written instructions provided with an item falsely claiming its use to ingest tobacco;

2) descriptive materials accompanying the item which falsely explained or depicted its use to ingest tobacco; and

3) displaying drug paraphernalia in such a way to obscure its primarily intended or designed use with marijuana and narcotics.

Such a scheme to utilize the Postal Service and other interstate conveyance as part of a scheme to sell drug paraphernalia was at all times in violation of Title 21, United States Code, Section 857(a)(1).

COUNT 1

From on or about August 1, 1988 through November 29, 1990, in the State and District of Colorado, the Defendants, JAMES B. JANUS and JANUS INDUSTRIES, d/b/a/Acapulco Smoke Shop, did knowingly and intentionally make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia.

All in violation of Title 21, United States Code, Section 857(a)(1) and Title 18, United States Code, Section 2.

COUNT 2

From on or about November 29, 1990 through January 29, 1991, in the State and District of Colorado, the Defendants, JAMES B. JANUS and JANUS INDUSTRIES, d/b/a Acapulco Smoke Shop, did knowingly and intentionally sell and offer for

sale drug paraphernalia as described in Title 21, United States Code, Section 863(d).

All in violation of Title 21, United States Code, Section 863(a)(1) and Title 18, United States Code, Section 2.

COUNT 3

On or about November 25, 1991, in the State and District of Colorado, the Defendants, JAMES B. JANUS and JANUS INDUSTRIES, d/b/a Acapulco Smoke Shop, did knowingly and intentionally sell and offer for sale drug paraphernalia as described in Title 21, United States Code, Section 863(d).

All in violation of Title 21, United States Code, Section 863(a)(1) and Title 18, United States Code, Section 2.

COUNT 4

On or about January 29, 1991, the Defendants, JAMES B. JANUS and JANUS INDUSTRIES, d/b/a Acapulco Smoke Shop, knowingly received and sold and facilitated the transportation and sale of merchandise imported into the United States contrary to law, to wit: drug paraphernalia in violation of Title 21 § 863(a).

All in violation of Title 18, United States Code, Section 545.

COUNT 5

On or about November 25, 1991, the Defendants, JAMES B. JANUS and JANUS INDUSTRIES, d/b/a Acapulco Smoke Shop, knowingly received and sold and facilitated the transportation and sale of merchandise imported into the United States contrary to law, to wit: drug paraphernalia in violation of Title 21 § 863(a).

All in violation of Title 18, United States Code, Section 545.

COUNTS 6 THROUGH 44

THE GRAND JURY FURTHER CHARGES THAT

From on or about August 1, 1988, up to and including January 28, 1991, in the State and District of Colorado and

elsewhere, the Defendants JAMES B. JANUS and JANUS INDUSTRIES, d/b/a Acapulco Smoke Shop, did knowingly, willfully and unlawfully conduct and attempt to conduct a financial transaction, to wit: a check drawn on funds deposited in a financial institution, Metro Bank of Denver, a/k/a Cherry Creek National Bank, affecting interstate and foreign commerce, knowing that the property involved in the financial transaction represented the proceeds from an unlawful activity, to wit: violations of Title 21 U.S.C. § 857(a)(1) and later superseded by Title 21 U.S.C. § 863(a)(1) and thereby conducted and attempted to conduct such financial transaction, which in fact involved the proceeds of said unlawful activity with the intent to promote the carrying on of said unlawful activity:

COUNT	CHECK DATE	CHECK NUMBER	PAYEE	AMOUNT
6	08/10/88	11646	California Trifles	$1,020.32
7	08/24/88	11657	California Trifles	1,269.87
8	09/30/88	11686	California Trifles	1,499.86
9	11/15/88	11750	California Trifles	774.57
10	11/28/88	11762	California Trifles	113.07
11	12/20/88	11799	California Trifles	1,457.76
12	12/28/88	11805	California Trifles	363.50
13	01/17/89	11834	California Trifles	40.51
14	02/10/89	11860	California Trifles	1,099.88
15	02/20/89	11867	California Trifles	976.19
16	03/29/89	11917	California Trifles	817.70
17	04/17/89	11940	California-Trifles	2,235.81
18	04/24/89	11951	California Trifles	106.69
19	05/08/89	11963	California Trifles	613.49
20	06/01/89	12001	California Trifles	72.15
21	08/08/89	12079	California Trifles	1,729.85

22	10/10/89	12167	California Trifles	1,093.20
23	10/25/89	12192	California Trifles	252.88
24	11/08/89	12202	California Trifles	945.42
25	11/08/88	11746	Fine Line Products	944.16
26	11/28/88	11763	Fine Line Products	1,190.41
27	03/13/89	11901	Fine Line Products	1,450.51
28	03/20/89	11906	Fine Line Products	3,888.78
29	04/17/89	11941	Fine Line Products	694.60
30	06/27/89	12022	Fine Line Products	82.11
31	08/10/89	12090	Fine Line Products	257.10
32	09/28/89	12148	Fine Line Products	125.49
33	11/15/89	12213	Fine Line Products	540.01
34	07/25/90	12536	Fine Line Products	378.57
35	07/22/88	11616	Pacific Laboratories	423.13
36	10/31/88	11728	Pacific Laboratories	647.75
37	11/30/88	11766	Pacific Laboratories	769.72
38	02/03/89	11850	Pacific Laboratories	937.93
39	03/22/89	11909	Pacific Laboratories	386.44
40	05/10/89	11974	Pacific Laboratories	2,091.45
41	10/06/89	12166	Pacific Laboratories	1,858.04
42	03/29/90	12378	Pacific Laboratories	953.50
43	07/25/90	12541	Pacific Laboratories	529.02
44	11/30/88	11768	Award Distributing	729.51

All in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i) and 2.

COUNT 45 THROUGH 160

THE GRAND JURY FURTHER CHARGES THAT:

From on or about August 1, 1988, up to and including January 28, 1991, in the State and District of Colorado and elsewhere, the Defendants JAMES B. JANUS and JANUS INDUSTRIES, d/b/a Acapulco Smoke Shop, did knowingly, willfully and unlawfully conduct and attempt to conduct a financial transaction, to wit: a deposit in a financial institution, Metro Bank of Denver, a/k/a Cherry Creek National Bank, affecting interstate and foreign commerce, knowing that the

property involved in the financial transaction represented the proceeds from an unlawful activity, to wit: violations of Title 21 U.S.C. § 857(a)(1) and as later superseded by Title 21 U.S.C. § 863(a)(1) and thereby conducted and attempted to conduct such financial transaction, which in fact involved the proceeds of said unlawful activity with the intent to promote the carrying on of said unlawful activity:

COUNT	DEPOSIT DATE	DEPOSIT NUMBER	AMOUNT
45	08/09/88	604	$4,338.42
46	08/16/88	605	1,871.56
47	08/23/88	606	3,234.71
48	09/02/88	607	2,084.18
49	09/13/88	608	5,126.18*
50	09/20/88	609	2,738.35
51	09/28/88	610	171.74
52	10/06/88	611	4,392.77
53	10/12/88	612	2,026.38*
54	10/21/88	613	3,292.22
55	10/26/88	614	2,164.41
56	11/02/88	615	2,477.29*
57	11/09/88	616	4,490.32
58	11/15/88	617	1,785.97*
59	11/22/88	618	2,721.03
60	12/05/88	619	5,309.00*
61	12/13/88	620	4,367.06*
62	12/20/88	621	4,629.81
63	12/28/88	622	4,350.20*
64	01/04/89	623	3,625.16
65	01/11/89	624	3,156.74*
66	01/17/89	625	2,488.25

67	01/24/89	626	6,424.78
68	02/02/89	627	1,639.81*
69	02/08/89	628	3,627.63
70	02/15/89	629	2,392.98
71	02/24/89	630	2,177.63
72	03/02/89	631	2,643.11*
73	03/08/89	632	2,205.55
74	03/14/89	633	5,496.90*
75	03/21/89	634	2,026.15*
76	03/29/89	635	2,699.04
77	04/04/89	636	2,492.36
78	04/11/89	637	4,884.97
79	04/19/89	638	2,047.45
80	04/25/89	639	1,655.95*
81	05/02/89	640	2,757.37
82	05/09/89	641	3,092.09*
83	05/17/89	642	2,063.24*
84	05/25/89	643	3,026.43
85	06/02/89	644	4,020.10
86	06/08/89	645	3,370.24
87	06/15/89	646	5,157.57
88	06/21/89	647	2,241.39*
89	06/27/89	648	2,806.93
90	07/05/89	649	1,664.27
91	07/11/89	650	2,939.93
92	07/18/89	651	1,872.78
93	07/25/89	652	2,981.33*
94	08/02/89	653	2,956.91
95	08/08/89	654	3,679.05
96	08/18/89	655	2,716.55
97	08/22/89	656	2,152.28
98	09/06/89	657	8,066.74
99	09/12/89	658	4,025.75
100	09/19/89	659	3,260.73
101	09/27/89	660	858.46

102	10/03/89	661	3,292.13
103	10/10/89	662	4,572.20
104	10/18/89	663	2,367.71
105	10/25/89	664	4,636.73
106	11/03/89	665	747.94
107	11/10/89	666	2,096.77
108	11/14/89	667	2,368.69
109	11/22/89	668	1,513.20*
110	12/01/89	669	2,494.07*
111	12/08/89	670	1,499.18
112	12/12/89	671	4,450.04*
113	12/19/89	672	1,660.25*
114	12/27/89	673	1,548.34
115	01/03/90	674	2,168.50
116	01/09/90	675	4,514.73
117	01/17/90	676	3,466.08*
118	02/02/90	677	5,561.00
119	02/14/90	678	5,616.59
120	02/23/90	679	4,003.19
121	03/02/90	680	2,811.23
122	03/13/90	681	3,142.59
123	03/20/90	682	1,878.92
124	03/28/90	683	3,956.48
125	04/03/90	684	2,797.55
126	04/10/90	685	4,265.83
127	04/18/90	686	3,118.99
128	04/25/90	687	3,689.36
129	05/02/90	688	2,366.63*
130	05/09/90	689	1,611.64
131	05/15/90	690	2,613.00*
132	05/23/90	691	1,797.15
133	06/04/90	692	2,279.93
134	06/12/90	693	2,903.00
135	06/26/90	694	2,473.71
136	07/05/90	695	2,718.25*

137	07/12/90	696	1,333.39*
138	07/18/90	697	2,503.88
139	07/25/90	698	1,527.16*
140	08/01/90	699	2,841.10
141	08/07/90	700	3,779.41
142	08/14/90	701	2,074.90
143	08/23/90	702	1,264.03
144	09/05/90	703	1,718.40*
145	09/12/90	704	3,532.97
146	09/26/90	705	1,107.47
147	10/02/90	706	905.04*
148	10/11/90	707	2,027.25
149	10/16/90	708	2,517.70
150	10/23/90	709	1,721.86
151	11/02/90	710	2,312.65
152	11/08/90	711	2,325.71*
153	11/14/90	712	1,403.79
154	11/20/90	713	1,004.70
155	11/28/90	714	1,018.37
156	12/05/90	715	1,652.31
157	12/12/90	716	3,874.94
158	12/19/90	717	1,767.29
159	12/27/90	718	1,453.99
160	01/04/91	719	2,026.43

(*Funds not involved in the drug paraphernalia scheme or the sale or offer for sale of drug paraphernalia, such as transfers between accounts, have been deleted from the deposit form total.)

All in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i) and 2.

COUNT 161

On or about January 29, 1991, in the State and District of Colorado, the defendant, JAMES B. JANUS, did knowingly and intentionally engage in the manufacture production, planting, cultivation and growing and aid, abet and cause the manufacture,

production, etc. of marihuana plants, a Schedule I controlled substance in violation of the laws of the United States of America as set forth in Title 21, United States Code, to wit: 21 U.S.C. §§ 841(a)(1) and (b)(1)(D) making it a crime to knowingly engage in the manufacture, production, etc. of marihuana plants, to wit: less than 50 marihuana plants.

All in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(D) and Title 18, United States Code, Section 2.

COUNT 162

FORFEITURE WITH RESPECT TO COUNT 2

The Allegations of Count 2 of the Indictment are re-alleged and by this reference are fully incorporated herein for the purpose of alleging forfeitures to the United States of America pursuant to the provisions of Title 21, U.S.C. § 863(c).

The Defendants, JAMES B. JANUS and JANUS INDUSTRIES, d/b/a Acapulco Smoke Shop, if convicted on Count 2 of this Indictment charging a violation of Title 21, United States Code, Section 863, shall forfeit to the United States of America pursuant to Title 21, United States Code, Section 863(c) all drug paraphernalia seized pursuant to search warrant executed January 29, 1991, such property being drug paraphernalia as described in Title 21, United States Code, Section 863(d).

Pursuant to Title 21, United States Code, Section 863(c).

COUNT 163

FORFEITURE WITH RESPECT TO COUNT 3

The Allegations of Count 3 of the Indictment are re-alleged and by this reference are fully incorporated herein for the purpose of alleging forfeitures to the United States of America pursuant to the provisions of Title 21, U.S.C. § 863(c).

The Defendants, JAMES B. JANUS and JANUS INDUSTRIES, d/b/a Acapulco Smoke Shop, if convicted on Count 3 of this Indictment charging a violation of Title 21,

United States Code, Section 863, shall forfeit to the United States of America pursuant to Title 21, United States Code, Section 863(c) all drug paraphernalia seized pursuant to search warrant executed November 25, 1991, such property being drug paraphernalia as described in Title 21, United States Code, Section 863(d).

Pursuant to Title 21, United States Code, Section 863(c).

COUNT 164

FORFEITURE WITH RESPECT TO COUNTS 6 THROUGH 160

The Allegations of Counts 6 through 160 of the Indictment are re-alleged and by this reference are fully incorporated herein for the purpose of alleging forfeitures to the United States of America pursuant to the provisions of Title 18, U.S.C. § 982.

As a result of the offenses alleged in Counts 6 through 160, the Defendants, JAMES B. JANUS and JANUS INDUSTRIES, d/b/a Acapulco Smoke Shop, shall forfeit to the United States of America pursuant to Title 18, United States Code, Section 982, any property, real and personal involved in the offenses or which is traceable to such property, and any of the Defendants' other property as a substitute for the above-described property, including but not limited to $330,615.27 in United States currency and all interest and proceeds traceable thereto, in that such sum in aggregate is property which was involved in the aforestated offenses or is traceable to such property, in violation of Title 18, United States Code, Sections 1956 and 982.

If any of the property described above as being subject to forfeiture, as a result of any act or omission of the Defendants:

1. Cannot be located upon the exercise of due diligence;

2. Has been transferred or sold to, or deposited with a third person;

3. Has been placed beyond the jurisdiction of the Court;

4. Has been substantially diminished in value; or

5. Has been commingled with other property which cannot be subdivided without difficulty; it is the intent of the United States, pursuant to Title 18, United States Code, Section 982(b)(1) to seek forfeiture of any other property of said Defendants up to the value of the above forfeitable property, that is $330,615.27, including but not limited to the following:

1. 3520 Brighton Boulevard, Denver, Colorado, with all appurtenances, fixtures, and attachments thereon, and the rents, profits, and proceeds therefrom (the "Store"); and

2. 7050 W. 8th Place, Lakewood, Colorado, with all appurtenances, fixtures and attachments thereon, and the rents, profits, and proceeds therefrom (the "House"); and

3. All monies, accounts, certificate of deposit, cashier's checks, deposits, contents of safe deposit boxes at Colorado Bank North East in which JAMES B. JANUS, JANUS INDUSTRIES, INC., and/or Acapulco Smoke Shop, Inc., has/have a legal or beneficial interest, together with all interest accrued or to be accrued thereon and the proceeds therefrom, (the "Colorado Bank North Account"); and

4. All monies, accounts, certificate of deposit, cashier's checks, deposits, contents of safe deposit boxes at Cherry Creek National Bank in which JAMES B. JANUS, JANUS INDUSTRIES, INC., and/or Acapulco Smoke Shop, Inc., has/have a legal or beneficial interest, together with all interest accrued or to be accrued thereon and the proceeds therefrom,

(the "Cherry Creek National Bank Account"); and

5. All monies, accounts, certificate of deposit, cashier's checks, deposits, contents of safe deposit boxes at Metro Bank of Denver in which JAMES B. JANUS, JANUS INDUSTRIES, INC., and/or Acapulco Smoke Shop, Inc., has/have a legal or beneficial interest, together with all interest accrued or to be accrued thereon and the proceeds therefrom, (the "Metro Bank of Denver Account"); and

6. All monies, accounts, certificate of deposit, cashier's checks, deposits, contents of safe deposit boxes at Cherry Creek National Bank in which JAMES B. JANUS, JANUS INDUSTRIES, INC., and/or Acapulco Smoke Shop, Inc., has/have a legal or beneficial interest, together with all interest accrued or to be accrued thereon and the proceeds therefrom, (the "Cherry Creek National Bank Account"); and

7. All monies, accounts, certificate of deposit, cashier's checks, deposits, contents of safe deposit boxes at Columbia Savings in which JAMES B. JANUS, JANUS INDUSTRIES, INC., and/or Acapulco Smoke Shop, Inc., has/have a legal or beneficial interest, together with all interest accrued or to be accrued thereon and the proceeds therefrom, (the "Columbia Savings Account"); and

All in violation of Title 18, United States Code, Section 982.

COUNT 165

FORFEITURE WITH RESPECT TO COUNTS 2, 3, AND 161

On or about January 29, 1991, the real property located at 3520 Brighton Boulevard, Denver, Colorado, all within the District of Colorado, including all right, title, and interest in the whole or the lot or tract of land and any and all appurtenances or improvements, was used in whole and in part to facilitate the commission of a violation of Title 21, United States Code, Section 841(a), and Title 21 U.S.C. § 863(a), felonies punishable by more than one year's imprisonment, and is therefore forfeited to the United States of America to the extent of the interests of JAMES B. JANUS and JANUS INDUSTRIES d/b/a Acapulco Smoke Shop as of the date of the violation.

Pursuant to Title 21, United States Code, Section 881(a)(7).

A TRUE BILL:

_____

FOREPERSON

JAMES R. ALLISON
Interim United States Attorney

BY: WILLIAM WELCH
Assistant U.S. Attorney

By: KATHLEEN M. TAFOYA
Assistant U.S. Attorney

DATE: July 20, 1993

DEFENDANT:
JAMES B. JANUS

ADDRESS:
7050 W. 8th Place
Lakewood, Colorado

OFFENSE:

Count 1
21 U.S.C. §85(a)(1)
18 U.S.C. §2
Use of Postal Service or other conveyance to sell drug paraphernalia

Counts 2 and 3
21 U.S.C. §863(a)(1)
18 U.S.C. §2
Sell and offer for sale drug paraphernalia

Counts 4 and 5
18 U.S.C. §545
Received and sold and facilitated the transportation and sale of merchandise imported into United States

Counts 6 through 160
18 U.S.C. §§ 1956(a)(1)(A)(i) and 2
Conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce

Count 161
21 U.S.C. §§ 841(a)(1) and (b)(1)(D)
18 U.S.C. §2
Manufacture and aid. abet and cause the manufacture of a mixture and substance containing a detectable amount of marihuana

Counts 162 and 163
21 U.S.C. §863(c)
Forfeiture with respect to Counts 2 and 3

Count 164
18 U.S.C. §982
Forfeiture with respect to Counts 6 through 160

Count 165
21 U.S.C. §881(a)(7)

Forfeiture with respect to Counts 2, 3 and 161

DATE: July 20, 1993

DEFENDANT:

JANUS INDUSTRIES
d/b/a "Acapulco Smoke Shop"

ADDRESS:

3520 Brighton Blvd.
Denver, Colorado

OFFENSE:

Count 1
21 U.S.C. §857(a)(1)
18 U.S.C. §2
Use of Postal Service or other conveyance to sell drug paraphernalia

Counts 2 and 3
21 U.S.C. §863(a)(1)
18 U.S.C. §2
Sell and offer for sale drug paraphernalia

Counts 4 and 5
18 U.S.C. §545
Received and sold and facilitated the transportation and sale of merchandise imported into United States

Counts 6 through 160
18 U.S.C. §§ 1956(a)(1)(A)(i) and 2
Conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce

Counts 162 and 163
21 U.S.C. §863(c)

Forfeiture with respect to Counts 2 and 3
Count 164
18 U.S.C. §982
Forfeiture with respect to Counts 6 through 160
Count 165
21 U.S.C. §881(a)(7)
Forfeiture with respect to Counts 2, 3 and 161

PENALTY:

Counts 1, 2 and 3
NMT 3 years imprisonment; NMT $250,000 fine or both; NMT 1 year supervised release; $50.00 special assessment as to each count
Counts 4 and 5
NMT 5 years imprisonment; NMT $10,000 fine or both; NMT 3 years supervised release; $50.00 special assessment as to each count

PENALTY:

Counts 1, 2 and 3
NMT 3 years imprisonment; NMT $250,000 fine or both; NMT 1 year supervised release; $50.00 special assessment as to each count
Counts 4 and 5
NMT 5 years imprisonment; NMT $10,000 fine or both; NMT 3 years supervised release; $50.00 special assessment as to each count
Counts 6 through 160
NMT 20 years imprisonment or NMT $500,00 fine or twice the value of the property involved in the transaction, whichever is greater; NMT 5 years supervised release; $50.00 special assessment as to each count

Count 161
NMT 5 years imprisonment; NMT $250,000 fine or both; NMT 3 years supervised release; $50.00 special assessment

AGENT:
Rick Stoffregen
Customs
Kimmi Harris
IRS

AUTHORIZED BY:
KATHLEEN M. TAFOYA & WILLIAM D. WELCH
Assistant U.S. Attorneys

ESTIMATED TIME OF TRIAL:

2 weeks

PRETRIAL RELEASE: Based on current information, detention of the defendant will _____ or will not __X__ be pursued.